No. 82-1766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SECURITIES INDUSTRY ASSOCIATION, *et al.*,
Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF BANKERS TRUST COMPANY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Bankers Trust Company ("Bankers Trust") adopts the respondents' statement of the question presented: "Whether the court of appeals correctly upheld a ruling by the Board of Governors of the Federal Reserve System that commercial paper—short-term promissory notes issued by large, financially sound businesses in very large denominations to meet their current needs and sold to a small number of financially sophisticated purchasers that regularly purchase short-term credit instruments—is not a security for purposes of the Glass-Steagall Act."

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INTEREST OF AMICUS CURIAE

This brief *amicus curiae* is filed with the written consent of all parties on behalf of Bankers Trust Company ("Bankers Trust"), a New York State-chartered member bank of the Federal Reserve System with headquarters in New York City. Bankers Trust acts as agent for certain corporations not affiliated with Bankers Trust that issue and sell commercial paper. The September 26, 1980 statement by the Board of Governors of the Federal Reserve System ("Board") that approved the commercial paper service of Bankers Trust is the subject of the instant litigation. Bankers Trust therefore has a significant interest in this case.

Bankers Trust has participated in the proceedings before the Board, as *amicus curiae* in both the district court and the court of appeals, and in this Court, where it filed a brief *amicus curiae* opposing the joint petition for certiorari. Bankers Trust is familiar with the historical developments in commercial lending that gave rise to its commercial paper service. Consequently the continued participation of Bankers Trust as *amicus curiae* will aid in the fullest possible development of all available information pertaining to the issues in this case.[1]

STATEMENT OF THE CASE

Bankers Trust adopts the respondents' statement of the case.

SUMMARY OF ARGUMENT

1. The decision of the Board treating commercial paper as "promissory notes," and not as either "securities" for purposes of Section 16 or as "notes, or other securities" for purposes of Section 21, gives Glass-Steagall a meaning in accord with its clear purpose. Commercial paper is indeed a note, but the term "notes" in Section 21 does not mean *all* notes, including all commercial credit instruments. Such a construction would lead to the manifestly unreasonable result of prohibiting commercial banks from engaging in a variety of other traditional banking practices such as selling loan participations, bankers' acceptances, and certificates of deposit.

2. Federal banking regulators have always regarded commercial paper as a loan, not as a security. Historically commercial paper has functioned in the nation's financial system as a short-term commercial credit instrument. In economic reality and in legal form it is indistinguishable from a traditional short-term bank loan. The legislative history of Glass-Steagall demonstrates that Congress was fully aware of the role commercial paper played as a credit instrument and that Congress

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[1] Bankers Trust adopts the respondents' abbreviations for petitioners, *i.e.*, SIA and Becker, and refers to their *amici curiae* as ICI and Goldman Sachs.

distinguished between commercial paper and "securities" in the Act. Indeed Congress enacted Glass-Steagall to encourage the return of bank funds from securities activities to commercial loans and commercial paper.

3. Commercial paper does not have the market risk inherent in securities. As so vividly put by Senator Glass,

> a man who makes a loan on commercial paper does not have to stand at a ticker and find out what is going to be the value of it 15 minutes afterwards.

That is the difference between commercial paper and a security.

4. Bankers Trust's commercial paper service does not threaten bank solvency or give rise to any other "hazards" that were the concern of Glass-Steagall. Moreover the Board's Guidelines avoid even "potential" hazards that otherwise might be involved.

ARGUMENT

Introductory Statement

A. The Decision Of The Board

When petitioners requested the Board to prohibit the commercial paper activities of Bankers Trust, the Board and its Division of Banking Supervision and Regulation and its Legal Division[2] devoted two years to a factual study of precisely what Bankers Trust was doing and an analysis of the issues. The Board then ruled that commercial paper is not a "security" for purposes of Glass-Steagall.[3] As stated by the court of appeals:

> Becker and the SIA requested the staff of the Federal Reserve Board to review the legality of Bankers Trust's

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[2] *See* Legal Division, Board of Governors of the Federal Reserve System, *Commercial Paper Activities of Commercial Banks: A Legal Analysis* (June 28, 1979) (R. 338-59).

[3] Federal Reserve System, *Statement Regarding Petitions to Initiate Enforcement Action*, dated September 26, 1980 (J.A. 122A-143A).

> activities. The Board's general counsel, after extensive discussion with Becker, SIA, Bankers Trust and the SEC, issued an opinion declaring that commercial banks may lawfully act as agent for the issuer in the sale of commercial paper, "provided that the sales . . . are limited to purchasers to whom commercial banks normally sell participations in loans." [citation to Legal Division's analysis] Becker and the SIA then requested the Federal Reserve Board to review the decision of its general counsel and to proscribe the commercial paper activities of member banks. After considering submissions by interested parties and conducting an on-site investigation of Bankers Trust's activities, the Board ruled that Bankers Trust's participation in the commercial paper market did not violate the Glass-Steagall Act. . . . (J.A. 224A)

Later the Board issued guidelines ("Guidelines") to make it clear that its decision related only to commercial paper that is exempted from registration under the Securities Act of 1933 by Section 3(a)(3) of that Act. 15 U.S.C. § 77c(a)(3) (1980).[4]

The decision of the Board that commercial paper is not a security is entirely consistent with the language of Sections 16 and 21 of the Glass-Steagall Act. After recognizing that a reading of the statute "that would thwart the clear purpose of the Act and that leads to irrational results . . . . cannot be dispositive of whether commercial paper is a security under the . . . Act" (J.A. 132A), the Board applied its expert knowledge of the banking business by making a "functional" analysis of whether commercial paper was more like a loan than a security. In reaching its conclusion the Board analyzed the history of commercial paper, the legislative history of Glass-Steagall, the statute itself, and commercial paper as a commercial credit instrument.

In responding to petitioners' objections the Board did not assume the authority to rewrite Glass-Steagall. It recognized that the statute had to be interpreted as to whether "secur-

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[4] *See* Federal Reserve System, *Policy Statement Concerning the Sale of Third-Party Commercial Paper by State Member Banks*, 46 Fed. Reg. 29333 (May 26, 1981) (J.A. 183A-189A).

ities" included commercial paper, just as it has interpreted the statute with respect to other credit instruments. It investigated the facts, analyzed the legal and policy issues, and issued "a carefully reasoned opinion." J.A. 224A. It is the expert in the business of banking and its decision merits support.

B. Opinions Of The Lower Courts

It is as important to understand what this case is *not* about as it is to understand what it is about. Affirmance of the court of appeals' decision will *not* allow Bankers Trust or any other commercial bank to underwrite stocks, bonds, notes with maturities over nine months, or other securities. Affirmance of the court of appeals' decision will *only* allow commercial banks to underwrite commercial paper that is exempted from registration under the Securities Act of 1933 by Section 3(a)(3).

The district court properly posed the question to be addressed as "whether commercial paper is in fact a 'note or other security' for purposes of the Glass-Steagall Act." J.A. 210A. In its footnote 10 the district court specifically disclaimed reaching the question whether Bankers Trust's commercial paper activities constituted "underwriting." J.A. 217A. Notwithstanding, the district court analyzed the case in terms of the question it did *not* answer, which we believe contributed greatly to the district court's incorrect conclusion. For example, the district court first noted that: "In the plaintiffs' view what distinguishes Bankers Trust's conduct from other, more traditional banking functions, is the unique role of Bankers Trust, functioning between the issuer and the purchaser of commercial paper." J.A. 210A-211A. The district court then proceeded to analyze the "role of Bankers Trust," stating:

> The problem with the Board's analysis emerges instantaneously: it ignores the specific conduct of the bank . . . . The Board's analysis would also sweep into its coverage almost all devices used by businesses to raise capital—*including stocks and bonds*—transforming transactions unquestionably at the heart of the securities industry into permissible activity for commercial depository banks

. . . . One factor present in this matter compels the conclusion that the commercial paper at issue here is not a loan, and that crucial aspect is the role of Bankers Trust in the transactions.[10]

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[10]The Court, like the Board, does not reach the question whether Bankers Trust was actually underwriting securities in violation of the Glass-Steagall Act. The question presented herein is whether the Board erred when it concluded that commercial paper was not a security under the Act. Although the Court has offered various characterizations to Bankers Trust's conduct, by no means does this opinion mean to convey that the bank was underwriting securities. (J.A. 217A-218A) (Emphasis added.)

In its footnote 10 the district court recognized that it was not deciding whether Bankers Trust was "underwriting securities in violation of the Glass-Steagall Act," but only whether "commercial paper was . . . a security under the Act." *Id.* However, the damage had been done; by mixing its analysis of the instrument with an analysis of the bank's role the district court reached the wrong conclusion on the only question actually presented.

The majority of the court of appeals concentrated on the question whether commercial paper is a "security" for purposes of Glass-Steagall. The dissent, however, also chose to look at the role of Bankers Trust in the transaction as being the "critical distinction between commercial banking and investment banking" (J.A. 251A), rather than looking at the instrument itself.

Petitioners in their briefs and oral arguments below have presented and here continue to present the issues as if the two questions were but one. They are not. Whether Bankers Trust's commercial paper activities are "underwriting" within the meaning of Glass-Steagall is a separate question from whether commercial paper is a "security" within the meaning of Glass-Steagall, and it is only the latter question that is before the Court in this case. To meld the two questions only leads to confusion, such as the district court's conclusion that a decision that commercial paper is not a "security" for purposes of Glass-

Steagall will allow banks to underwrite "stocks and bonds." J.A. 217A. Nothing could be further from the truth.

It is particularly important to look at the instrument itself in deciding this case.[5] If the Court examines the instrument itself and concludes, as the court of appeals properly concluded, that commercial paper is not a "security" for purposes of Glass-Steagall, that is the end of the inquiry.

C. The Bankers Trust Commercial Paper Program

In the program under attack Bankers Trust as agent for the issuer sells only prime quality negotiable promissory notes that are exempt from registration under Section 3(a)(3) of the Securities Act of 1933. In order to qualify for that exemption the proceeds of the paper must be used for "current transactions" of the issuer and the maturity of the paper must not be over nine months.[6] Bankers Trust handles only highly rated issuers that have 100 percent commercial bank back-up lines of credit for the paper being handled. In addition the paper must be sold to financially sophisticated customers, such as institutional purchasers, and the paper is issued only in denominations of $100,000 or more. Guidelines ¶ 1, J.A. 187A. The average denomination is $1,000,000 or more. J.A. 245A at n.81.

It is not accidental that the instrument in question is called commercial paper and that Bankers Trust is a commercial bank. Short-term promissory notes such as commercial paper have long been the premier instruments to which commercial banks have committed their funds and which they have bought

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[5] The nature of the instrument is in fact a key to distinguishing between commercial and investment banking. As a text on investment banking written in 1936 states, the most common factor used in making a rough practical distinction between commercial and investment banking is that of *time*—commercial banking involving short-term advances to borrowers and investment banking involving long-term advances usually represented by securities. H. Willis and J. Bogen, *Investment Banking* 6 (rev. ed. 1936).

[6] 15 U.S.C. § 77c(a)(3) (1980).

and sold. No one would dispute that a commercial bank may purchase a commercial paper note directly from an issuer and hold it to maturity. It seems ironic for petitioners to claim that somehow commercial paper becomes too risky or is otherwise inappropriate for a commercial bank to sell whenever the issuers of such notes attain sufficient financial strength to be able to sell their notes directly to sophisticated purchasers, rather than borrowing on the same note from a commercial bank.

Regardless of the outcome of this case, commercial banks will continue to assume the credit risk of commercial paper by purchasing it or by extending back-up lines of credit. As stated by Goldman Sachs (Br. 11),

> Commercial paper issuers are required in nearly all instances to arrange back-up bank lines of credit equal in amount to 100 percent of the face value of the commercial paper to be marketed. That is, the issuer must arrange for a commercial bank to provide stand-by lending authority sufficient to cover the full amount of the commercial paper when it comes due.

Thus the banks will continue to be the ultimate lenders and the ultimate risk takers in commercial paper transactions.[7] If they are already at risk on the issuer's credit, to prohibit commercial banks from acting as the issuer's sales agent on the ground that it will expose the banks to hazards that Congress sought to avoid would honor form over substance.

Commercial banks have been buying and selling commercial paper for more than a hundred years.[8] Although most of the purchasers of commercial paper from banks used to be other

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[7] *See* Hurley, *The Commercial Paper Market since the Mid-Seventies*, 68 Fed. Reserve Bull. 327, 333 (1982).

[8] *See* A. Greef, *The Commercial Paper House in the United States* 45-51, 379 (1938). SIA only asserts that banks did not *regularly* distribute commercial paper before Glass-Steagall (*see* Br. 15 n.14, emphasis changed from "not" to "regularly") and its assertion that banks did not underwrite such paper after Glass-Steagall ignores the Comptroller's 1971 ruling that permitted "dealing" and therefore "underwriting." J.A. 28A. *See* pages 19-20, *infra*.

banks, there were non-bank purchasers even prior to the enactment of Glass-Steagall.[9] In recent years not only has the commercial paper market grown but the amount of paper purchased by non-banks has grown too.[10]

The issuers of commercial paper are the banks' present and former prime commercial borrowers.[11] The purchasers of commercial paper are often institutions that formerly kept their excess or unneeded funds on deposit with the banks.[12] When the banks realized in the 1970s that their prime borrowers were unlikely to return to their former borrowing habits, the banks attempted to adjust. Some banks attempted to compete by making loans at or near the commercial paper rate, and in the late 1970s considerable below-prime lending developed.[13]

For its response Bankers Trust decided to capitalize on its expertise in the money market, basically a market for short-term credit instruments,[14] by assisting its customers and for-

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[9] Although nonfinancial corporations have been purchasers for well over 50 years, in the 1930s they were a small part of the market. *See Greef, supra* note 8, at 96, 292.

[10] From approximately $15 billion in 1966, commercial paper increased to $64.6 billion in 1977 and to $180.7 billion in 1982, approximately where it remains today. *See* M. Stigum, *The Money Market* 627-28 (rev. ed. 1983); Fed. Reserve Bank of N.Y., Weekly Release, Commercial Paper Outstanding (Dec. 21, 1983).

As of 1981 approximately 95 percent of all commercial paper was held by non-bank purchasers. *See* Abken, *Commercial Paper*, Fed. Reserve Bank of Richmond Econ. Rev. 11, 13 (Mar./Apr. 1981).

[11] *See* Hurley, *The Commercial Paper Market*, 63 Fed. Reserve Bull. 525, 527 (1977); Abken, *supra* note 10, at 15.

[12] *Id.* at 14.

[13] *Id.* at 17.

[14] The money market consists mostly of short-term U.S. Treasury and agency debt, bankers' acceptances, certificates of deposit, municipal notes, and commercial paper. *See* Stigum, *supra* note 10, at 1, 30-43. The form of marketable Treasury obligations depends on the

mer borrowers in the sale of their commercial paper. The instrument is one that Bankers Trust has bought and sold for its own account for years and for which the bank has provided and is providing billions of dollars of back-up credit. Thus Bankers Trust is fully familiar with commercial paper and the bank's program developed as a direct result of the growth of the commercial paper market and the bank's desire to continue to help provide short-term financing for its prime customers.

D. The Securities Industry Is Attempting To Eliminate Competition.

Petitioners and their *amici* are trying to use Glass-Steagall for a purpose not intended, that is, in order to lessen their competition they are attempting to drive banks out of part of the banking business.[15] If petitioners and their *amici* are successful in this attempt, they will have changed more than a century of commercial banking practice, including the practices of the 50 years since Glass-Steagall was enacted.

When banks were dealing in commercial paper on an occasional basis, the investment bankers did not attack the regulatory rulings such as the ruling in 1971 of the Office of the Comptroller of the Currency ("Comptroller") (J.A. 28A; *see* pages 19-20, *infra*).[16] When the commercial paper market ex-

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length of time for which they are issued and they are designated accordingly. Treasury *bills* have a maturity at issue of a year or less; Treasury *notes* have a maturity at issue of 1 to 10 years; and Treasury *bonds* have a maturity at issue of 10 years or more. *Id.* at 30.

[15] The investment banks that participate in commercial paper transactions are in fact performing the traditional lending functions of commercial banks, rather than their own traditional function of facilitating long-term capital financing. *See* R. Foulke, *The Commercial Paper Market* 134 (1933); Greef, *supra* note 8, at 378-79.

[16] SIA argues (Br. 27 n.35) that Congress in 1980 specifically denied the Comptroller any authority to regulate the securities activities of national banks under Glass-Steagall. More significant, however, is the fact that Congress did not disturb the Comptroller's "long-standing" view that commercial paper are loan assets, not securities. *See* J.A. 28A.

panded, however, and Bankers Trust attempted to retain its high-grade clientele by servicing their commercial paper needs, the investment banking industry sought to squelch the competition. Their attack is against the public interest. Increased competition, which classically reduces prices, will be a benefit both to the economy in general and to the issuers and purchasers of commercial paper in particular.

Glass-Steagall was not intended to bar commercial banks from traditional commercial banking activities and Congress never intended to protect investment bankers from competition.[17] Bankers Trust is not attempting to encroach on the investment banking industry. It is simply attempting to maintain its traditional business involving short-term lending and short-term credit instruments.

I.

The Language Of The Glass-Steagall Act Permits Banks To Sell Promissory Notes Such As Commercial Paper.

In determining what kinds of notes Congress intended to include within the prohibitions of Section 21 of Glass-Steagall the term "notes" must be viewed in the context of the words around it: "stocks, bonds, debentures, notes, or other securities." *See Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).[18] As this Court said in another federal banking statute case, "words grouped in a list should be given related meaning." *Third National Bank in Nashville* v. *IMPAC Ltd.*, 432 U.S. 312, 322 (1977).

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[17] "[N]either the language of the pertinent provisions of the Glass-Steagall Act nor the legislative history evinces any congressional concern for . . . freedom from competition." *Investment Company Institute* v. *Camp*, 401 U.S. 617, 640 (1971) (Harlan, J., dissenting on the issue of petitioners' standing).

[18] We limit our discussion to "notes, or other securities" in Section 21 because "securities" in Section 16 would not be broader than "securities" in Section 21.

By including these companion words Congress evidenced its intent to prohibit banks from underwriting, selling, or distributing notes that have the same economic characteristics as stocks, bonds, and debentures and hence are in the nature of a security, as distinguished from notes that are commercial credit instruments and hence are in the nature of a loan. Commercial paper is not a note in the nature of a security, but rather is a promissory note that has the economic characteristics of a traditional short-term loan.

Relying on *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971) ("*ICI I*"), petitioners contend, however, that this Court has instructed that Sections 16 and 21 of Glass-Steagall are to be construed "broadly" and their terms applied "literally." Becker Br. 26; SIA Br. 12-13. In *ICI I* this Court held that the term "securities" could not be construed so narrowly as to exclude participating interests in an open-end stock fund. But it does not follow that the term should be expanded to encompass commercial credit instruments.[19]

Petitioners argue that a functional analysis of commercial paper is unnecessary and improper because Glass-Steagall "flatly and unambiguously" prohibits banks from selling "all"

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[19] In addition to *ICI I*, SIA cites three other cases in support of the argument that the term "securities" in Glass-Steagall should be construed "broadly." SIA Br. 12.

In *Board of Governors* v. *Investment Company Institute*, 450 U.S. 46 (1981), this Court simply noted that in *ICI I* it had relied upon the "literal" language of the Glass-Steagall Act. 450 U.S. at 65. The issue of whether terms in the Act should be construed narrowly or broadly was not considered because "[n]o one could dispute" that the instruments in question were "securities." *Id.* at 66.

In the other two cases, *Board of Governors* v. *Agnew*, 329 U.S. 441 (1947), and *Awotin* v. *Atlas Exchange Nat'l Bank of Chicago*, 295 U.S. 209 (1935), construction of the term "securities" in the Act was not at issue. *Awotin* actually involved the McFadden Act, enacted by Congress in 1927 and then later incorporated into and amended by Glass-Steagall.

notes. SIA Br. 17; Becker Br. 27. But the statute does not say "all" notes or "any" note. Rather the undefined term "notes" is modified by its companion words "stocks, bonds, debentures, . . ., or other securities."[20] In determining whether a particular note is in the nature of a security like stocks, bonds, and debentures, a functional analysis is therefore both necessary and appropriate.

In interpreting the term "notes" in Glass-Steagall the Board relied on its expert knowledge of commercial banking to examine the function of commercial paper in the nation's financial system. The Board's functional analysis was essential to its interpretation, and it is that functional analysis—as well as the Board's factual investigation—that is entitled to respect. The Board is the agency charged with overseeing the administration of proper banking practices of member banks and ensuring the safety and soundness of our commercial banking system. As this Court said in *ICI I:*

> It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. 401 U.S. at 626-27.

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[20] Becker tries to ignore the complete list in Section 21 of Glass-Steagall by repeatedly quoting the phrase "notes or other securities" [sic] as the only language to be construed. *E.g.*, Becker Br. i, 8, 21, 25. (Becker usually omits the comma following the word "notes" in Section 21.) Similarly SIA focuses almost exclusively on the two words "notes" and "securities" in an attempt to construe those terms in isolation. *E.g.*, SIA Br. 2, 8, 13, 17.

Becker argues that the juxtaposition of the terms "notes" and "other securities" demonstrates that all notes, including commercial paper, are "included within the generic definition of the broader term 'securities.'" Becker Br. 26. The term "notes," however, is itself quite broad and, given all meanings, would embrace bonds and debentures, making their inclusion in the list redundant. Accordingly, as a general term "notes" should be construed to embrace only "items akin to those specifically enumerated." *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588 (1980).

Petitioners and their *amici* have nevertheless argued (*e.g.*, Becker Br. 22-24, SIA Br. 33-34) that no deference is due the Board and its banking expertise because Glass-Steagall is not a regulatory statute. In *ICI I* the Court rejected the Comptroller's Glass-Steagall ruling not because he was not entitled to deference, but because "the Comptroller adopted no expressly articulated position at the administrative level." 401 U.S. at 627. Here the Board examined the issues and issued a 28-page decision. In addition, with the statute expressly authorizing "carry[ing] on the business of banking" by discounting and negotiating "promissory notes," and with an apparent conflict between that use of the word "notes" in Section 16 and the use of the word "notes" in Section 21, it would appear to be the very case in which to rely on the banking expertise of the Board.

This Court has never had occasion to construe the phrase "notes, or other securities" as used in Section 21. Thus, in the words of this Court, "[t]his case presents an entirely different issue" from the issue presented in *ICI I. See Board of Governors* v. *Investment Company Institute*, 450 U.S. 46, 66 (1981) ("*ICI II*"). More important, unlike the situation in *ICI I*, construction of the phrase "notes, or other securities" in Section 21 to include the instrument at issue not only would conflict with "notes" in Section 16 but would frustrate "the business of banking."

This Court has already emphasized that Glass-Steagall "surely was not intended to require banks to abandon an accepted banking practice." *ICI II*, 450 U.S. at 63.[21] If the phrase "notes, or other securities" in Section 21 were construed to mean all notes it would include a number of commercial credit instruments that banks have sold for over one hundred years.

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[21] Becker incorrectly states that *ICI II* is not "controlling" because it involved the Bank Holding Company Act, not the Glass-Steagall Act. Becker Br. 41 n.72. In fact *ICI II* raised issues under both Acts and this Court discussed the Board's guidelines regarding bank investment advisory services in the specific context of Glass-Steagall. 450 U.S. at 66-67.

The effect would be to eviscerate traditional bank functions by prohibiting such unquestioned and unquestionably lawful activities as buying and reselling loans, bankers' acceptances, and certificates of deposit, as well as prohibiting banks from purchasing commercial paper for their own account. In order to avoid giving "unintended breadth to the Acts of Congress," *Jarecki* v. *G.D. Searle & Co.*, 367 U.S at 307, the scope of the phrase "notes, or other securities" must be limited by reference to the companion words "stocks, bonds, debentures," so as not to include notes that are commercial credit instruments.[22]

Petitioners and Goldman Sachs have struggled unsuccessfully with the language of 12 U.S.C. § 24 Seventh as amended by Section 16 of Glass-Steagall.[23] They have tried in several

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[22] Becker also argues that because in 1935 Congress expressly "excluded" mortgage notes from the coverage of Section 21, exclusion of other notes cannot be implied, Becker Br. 27-28. In fact Congress did not "exclude" mortgage notes, which banks had always been authorized to sell (*see* note 23, *infra*), but rather simply clarified that Section 21 did not limit "such rights as banks may otherwise possess to sell obligations evidencing loans on real estate." S. Rep. No. 1007, 74th Cong., 1st Sess. 15 (1935). A statutory exclusion would be necessary only for those notes in the nature of a security, and Congress may well have thought that a mortgage note—usually an instrument with a term of several years—might otherwise be considered a note in the nature of a security. *Cf.* note 5, *supra*. Congress did not have any corresponding reason to clarify the meaning of "notes" to exclude certificates of deposit, bankers' acceptances, or commercial paper, which are unmistakably commercial credit instruments.

[23] *See* Becker Br. 28 n.45; Goldman Sachs Br. 21-23.

The first two sentences of 12 U.S.C. § 24 Seventh read in pertinent part as follows:

> Seventh. To exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; . . . The business of dealing in securities and stock by the [bank] shall be limited to purchasing and selling

ways to explain how commercial banks can continue to deal in loan participations, bankers' acceptances, and certificates of deposit under Paragraph Seventh, even though they take the position that the authority to carry on the business of banking by discounting and negotiating promissory notes does not apply to commercial paper.[24] They have not provided a good explanation, especially with respect to loan participations. Their problem, which was recognized by both the Board and the court of appeals, is that there is no material difference between these other bank instruments and commercial paper.

> such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the [bank] shall not underwrite any issue of securities or stock. . . .

Becker contends that the authority to discount and negotiate notes does not empower banks to sell notes. Becker Br. 28 n.45. One of the very cases cited by Becker is to the contrary. In *First Nat'l Bank of Hartford* v. *City of Hartford*, 273 U.S. 548 (1927), this Court rejected the argument that the National Bank Act did not authorize banks to sell such notes as "mortgages and other evidences of debt" acquired by loan or discount. 273 U.S. at 560. Banks therefore were free to compete in the "business of acquiring and selling" such notes.

[24] Goldman Sachs contends that these traditional bank functions would not be prohibited because the National Bank Act expressly authorizes banks to issue and purchase notes, while Glass-Steagall merely prohibits the sale of notes. Goldman Sachs Br. 21-23. If Glass-Steagall prohibits the sale of notes, however, banks would be barred from such traditional bank activities as the sale of loan participation certificates and bankers' acceptances. Furthermore, if notes like commercial paper are "securities" for purposes of Glass-Steagall, then banks would be prohibited from purchasing commercial paper for their own account because banks are authorized to purchase only "investment securities" for their own account. 12 U.S.C. § 24 Seventh. Congress did not consider or intend commercial paper to be within the definition of "investment securities," 67 Cong. Rec. 3232 (1926), and neither did the Board. *See* Board letter to Congress in *Hearings on H.R. 4314 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 1st Sess. 180 (1933); *Hearings on S. 875 Before the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 120 (1933).

In the typical loan participation the bank makes or buys a loan and then sells "participation certificates" that formalize the legal rights and obligations of the participants.[25] Banks have long sold loan participations where, because of the need for liquidity or the need to spread risks, a single bank is unable or unwilling to make the entire loan. Banks also sell participations as an accommodation to a purchaser that would like to earn interest on its funds.[26] Thus participation certificates and commercial paper are functionally similar loan instruments.[27]

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[25] *See* Thuleen, *Survey of Practice and Procedure of Banks in Taking Participations from Correspondent Banks*, 50 J. Com. Bank Lending 10, 17-18 (1968). Certificates that evidence loan "participations" may evidence the sale of part or all of a loan. If the whole loan is sold through a participation, the transaction is known in the banking industry as a "100% participation."

[26] *See* Armstrong, *The Developing Law of Participation Agreements*, 23 Bus. Law. 689 (1968). Consequently "some commercial banks purchase loan participation interests as a substitute for commercial paper purchases." Legal Division, *supra* note 2, at 6 (R. 344).

[27] Goldman Sachs concedes that banks historically sold commercial paper to other banks and that such "participations" closely resemble the participations of loans, which is "entirely consistent with the banks' recognized and traditional lending function." Goldman Sachs Br. 26 (emphasis deleted). Goldman Sachs contends, however, that commercial paper and loan participations include only bank participants, in contrast to Bankers Trust's commercial paper sales that involve non-bank participants. Goldman Sachs Br. 23 n.13. To the contrary, as the Board recognized in its analysis, loan participations are in fact sold to all kinds of institutional purchasers. *See* Legal Division, *supra* note 2, at 4 and n. 13 (R. 342). (*See also* note 3, *supra*.) The courts have also recognized that loan participations commonly involve participants other than banks. *See, e.g.*, *Union Planters Nat'l Bank of Memphis* v. *Commercial Credit Business Loans, Inc.*, 651 F.2d 1174 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981) (finance company); *American Fletcher Mortgage Co.* v. *U.S. Steel Credit Corp.*, 635 F.2d 1247 (7th Cir. 1980), *cert. denied*, 451 U.S. 911 (1981) (mortgage company, finance company, and trust company); *Robbins* v. *First Am. Bank of Va.*, 514 F. Supp. 1183 (N.D. Ill. 1981) (union pension fund).

Bank sales of commercial paper are also functionally similar to the sale of bankers' acceptances. A banker's acceptance is "one type of a broad class of credit instruments known as bills of exchange" which are used mostly to finance imports and exports.[28] Typically a bank arranges to pay for the incoming goods of a creditworthy importer through a draft drawn on it by the exporter. If the lending bank agrees to extend credit to the importer for the amount of the goods, it often chooses not to hold the draft for the duration of the financing but to stamp the draft "accepted" and to resell the acceptance in its entirety or to fractionalize the acceptance by selling participations in it. Commercial banks may sell not only their own acceptances on which they are liable, but they can and do trade in acceptances of other banks on which the trading bank is not liable. In selling acceptances, as in selling loan participations, a bank is simply diversifying its lending base or redistributing loans to more willing lenders; the bank has made or bought a loan and it is selling all or a part of it.[29] The Comptroller has determined that bank sales of acceptances and participations in acceptances are "permissible under the Glass-Steagall Act" because the "express power under 12 U.S.C. § 24 (Seventh) to discount and negotiate drafts and bills of exchange squarely empowers a national bank to buy and sell acceptances created by any bank."[30]

This Court has emphasized that the prohibitions of Glass-Steagall do not extend to activities that "are not significantly different from the traditional . . . functions of banks." *ICI II*,

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[28] J. Joines, "Bankers' Acceptances," *Instruments of the Money Market* 77 (4th ed. 1977).

[29] *Id.* at 75-76. *See* The Bond Buyer, Aug. 30, 1983, at 1.

[30] Letter dated August 4, 1983 from the Comptroller to [name of addressee-bank deleted in copy of letter made publicly available], [Current] Fed. Banking L. Rep. (CCH) ¶ 85,432, at 77,570. *See also* Letter dated June 8, 1934 from the Secretary of the Board of Governors to the Federal Reserve Agent, Federal Reserve Bank of New York (bankers' acceptances are not "securities" for purposes of the Glass-Steagall Act).

450 U.S. at 55. The economic reality of a bank's selling commercial paper that a customer has issued or that the bank has purchased, like the sale of loan participations and bankers' acceptances, is that the bank is selling a commercial credit instrument. Selling commercial credit instruments like those discussed above—including commercial paper—in order to diversify, create liquidity, or accommodate an issuer or a purchaser is part of the traditional functions of banks and is a lawful activity under Glass-Steagall.

II.

Commercial Paper Functions As The Equivalent Of A Commercial Loan.

As stated by the Board in its decision in 1980, "it has been the consistent and uniform practice of the bank regulatory agencies for almost 50 years to consider commercial paper as a loan . . . ." and "[t]he present attitude of the bank regulatory agencies is consistent with the view that commercial paper is properly viewed as a loan . . . . The instructions of each of the three federal banking agencies for preparation of call reports direct that commercial paper be treated as a loan." J.A. 129A, 130A.[31]

Similarly in ruling in 1971 that a commercial bank may lawfully act as a dealer in—that is, a buyer *and* seller of—commercial paper, the Comptroller said:

> [Y]ou inquire whether dealing in commercial paper would constitute dealing in securities prohibited by the Glass-Steagall Act, 12 U.S.C. 377, 378, 78 and 24. The answer to this question depends on whether note obligations commonly known as commercial paper are considered securities for this purpose. This office has taken the posi-

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[31] A "call report" is a "[s]tatement of condition of a bank submitted in response to calls by the supervisory authorities . . . . on a specified form in accordance with instructions. . . ." G. Munn and F. Garcia, *Encyclopedia of Banking and Finance* 155 (8th ed. 1983). Bank accountants also treat commercial paper held by the bank as a loan in bank financial statements.

> tion that such obligations are not "securities" for the purposes of the Glass-Steagall Act, provided such notes are exempt from registration under Section 3(a)(3) of the Securities Act of 1933, and that a national bank may deal in such exempt securities. *The long-standing position of the office is that commercial paper are loan assets.* . . . (J.A. 28A) (Emphasis added.)

Since both the Board and the Comptroller treat commercial paper as an unsecured loan (J.A. 130A), a commercial bank that purchases commercial paper must keep the commercial paper of any corporate issuer held by the bank at any one time, plus all other outstanding extensions of credit to that corporation, within the unsecured lending limit of the bank. A piece of commercial paper is in fact indistinguishable in substance from a note taken by a commercial bank to evidence a traditional short-term loan. Often they are both evidenced by an identical piece of paper. Therefore, if the bank reaches its lending limit for a corporation, it must either sell the commercial paper or another commercial loan that it had previously acquired from the corporate issuer or stop buying the issuer's new paper until the loan evidenced by the paper that the bank owns matures. When one combines the generally very short maturity of commercial paper (the average maturity is less than 30 days)[32] with the lending limit restrictions on how much commercial paper a commercial bank can hold, one begins to understand why commercial bankers are puzzled by the arguments advanced about the "risks" of commercial paper for commercial banks. *See* footnotes 43-44 at page 24, *infra*.

This treatment of commercial paper as a loan is consistent with the historical development of the instrument. The commercial paper market in the United States developed rapidly after the Civil War as a result of a great expansion in industry and trade, to a total outstanding volume of $2 billion in 1914.[33] By 1920, however, the market began to decline and there was a parallel decline in direct loans by banks to commercial and

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[32] *See* Stigum, *supra* note 10, at 632.

[33] *See* Greef, *supra* note 8, at 38, 115.

industrial customers.[34] The outstandings of commercial paper and bank loans moved in parallel because they were essentially two equivalent methods for business to obtain bank credit.[35]

The decline in commercial loans and in commercial paper, its functional equivalent, was "brought about by similar forces," principally the dramatic increase in corporate underwritings.[36] In the 1920s "underwritings had steadily increased as money conditions became easier, making it possible to obtain capital in the form of long term or capital securities at a decreasing rate of interest or cost"; from 1919 to 1929 annual underwritings of corporate securities jumped from approximately $2.7 billion to $10.3 billion.[37]

The decline in commercial loans and commercial paper encouraged banks to seek employment in the securities markets for increasing amounts of surplus funds. As a result the banks became heavily involved in securities activities.

Congress was greatly alarmed by this flow of bank funds away from commercial loans and commercial paper:

> The flow of funds through the hands of the general public into those of the corporations, and from the latter into the hands of brokers and dealers, who then re-lent the funds to the public engaged in speculation, was thus primarily the result of a loose banking policy which had turned from the making of loans on commercial paper to the making of loans on security.[38]

Accordingly Congress enacted Glass-Steagall to restrict the securities activities of banks and to encourage the flow of bank funds back to commercial loans and commercial paper.

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[34] *Id.* at 177; *Operation of the National and Federal Reserve Banking Systems: Hearings Before the Senate Comm. on Banking and Currency ("1932 Hearings")*, 72d Cong., 1st Sess. 271, 299-300 (1932).

[35] *See* Foulke, *supra* note 15, at 146-47.

[36] *See* Greef, *supra* note 8, at 177.

[37] *See* Foulke, *supra* note 15, at 19-20.

[38] S. Rep. No. 77, 73d Cong., 1st Sess. 4 (1933).

The impetus for Glass-Steagall and its entire legislative history therefore demonstrate that Congress distinguished between commercial paper and "securities." For example a manager of the bill that became Glass-Steagall noted the growth in corporate borrowing "by the sale of their own securities rather than by borrowing at the commercial banks upon their commercial paper—that is, upon their notes."[39] By the term "securities" Congress meant only instruments representing "long-term" investments that "tied up" bank funds and thus could threaten bank solvency.[40] Congress was not concerned with instruments that historically had functioned as short-term commercial credit instruments.[41]

The fact that Senator Glass argued for an exclusion of commercial paper from the definition of securities in the almost contemporaneous Securities Act of 1933 but did not create a specific exemption in his own namesake does not make commercial paper a security in the eyes of the 73d Congress.

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[39] 75 Cong. Rec. 9904 (1932) (remarks of Senator Walcott).

[40] S. Rep. No. 77, 73d Cong., 1st Sess. 8 (1933). In 1929 and subsequent years when securities such as stocks and bonds became virtually worthless, outstanding commercial paper was paid regularly. *See* Greef, *supra* note 8, at 182-83. In the decade prior to Glass-Steagall bank losses on commercial paper were significantly less than even losses on direct bank loans and discounts, in addition to being a mere fraction of bank losses on stocks and bonds. *See* Foulke, *supra* note 15, at 84-89.

[41] SIA argues that in discussing the commercial paper activities of banks Congress referred only to their "purchasing commercial paper for their own accounts" because banks had not sold commercial paper. SIA Br. 20. In fact commercial banks had sold as well as purchased commercial paper. *See* Greef, *supra* note 8, at 379. As confirmed by Goldman Sachs, big city banks purchased commercial paper "either directly from the issuers or indirectly through commercial paper houses and placed portions of the paper, or 'participations,' with other institutions." Goldman Sachs Br. 25-26.

Rather it shows they recognized that his bill did not include such paper within the meaning of "securities."[42]

In summary, commercial paper is the functional equivalent of a commercial loan. A purchaser of commercial paper advances money to the issuer of the paper in return for the issuer's promise to pay back the money advanced on a specific future date, with interest either discounted or at a stated rate. Commercial banks have long been integrally involved in the commercial paper market, by purchasing paper for their own account, by extending back-up lines of credit to the issuers of the paper, and by selling paper to correspondent banks and other customers. There is no reason to change a commercial bank's historical function simply because it chooses to increase the amount of its activity.

III.

Commercial Paper Does Not Have The Market Risk Inherent In Securities.

Commercial banking is not risk free. In extending a loan there is always the possibility of a default, and when a bank purchases commercial paper or extends a back-up line of credit to the issuer to support its paper there is the credit risk that the paper may not be paid at maturity.

Thus banks have assumed and will continue to assume the credit risk involved with commercial paper. That risk, however, is neither greater than nor different from the ordinary lending risk that banks traditionally have undertaken. Indeed,

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[42] Senator Glass' proposed amendment to exclude commercial paper from the definition of a "security" in the Securities Act was eventually adopted by Congress as an exemption from the registration requirements of that Act and his statements concerning the need for such an amendment demonstrate that he viewed commercial paper activities as closely linked to commercial banking and not as a speculative investment banking activity that the Glass-Steagall Act was intended to prohibit. *See* J.A. 133A-134A (Statement of the Board); *Hearings on S. 875 Before the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 98 (1933) (remarks of Senator Glass).

the potential risk involved with commercial paper is significantly less than with a typical cross section of commercial bank loans because the default rate on commercial paper is only a fraction of that on other commercial bank loans.[43]

In addition, commercial paper does not carry significant market risk.[44] Commercial paper "does not fluctuate with

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[43] *See* Greef, *supra* note 8, at 182-83.

Commercial paper defaults over the past 15 years, including Penn Central, average approximately 1/100 of 1 percent of average annual commercial paper outstanding. *See* Stigum, *supra* note 10, at 628, 635. By comparison, average net loan losses for 1982 of the 10 largest bank holding companies exceeded 50/100 of 1 percent of average loans outstanding. *See* Morgan Stanley Investment Research, *Bank Performance Review 1983 Edition* 164-65. Thus the risk of commercial bank loan loss was approximately 50 times greater than that of commercial paper default.

The money market judges commercial paper to be among the most riskless of all instruments as evidenced by the fact that the rates paid on commercial paper are only slightly above those paid on Treasury bills themselves. *See* Hurley, *supra* note 11, at 525.

[44] Full value of commercial paper can be realized by waiting the relatively short period until maturity. The average maturity is less than 30 days and less than 1½ percent is sold before maturity. *See* Stigum, *supra* note 10, at 632, 641.

Another indication of the relative risklessness of commercial paper is its treatment under the "net capital" rules of the SEC. In calculating the "net capital" of a broker-dealer, SEC regulations, 17 C.F.R. § 240.15c3-1(c)(2)(vi)(1983), provide that certain specified percentages shall be deducted from "the market value of all securities, money market instruments or options in the proprietary or other accounts of the broker or dealer." Subdivision (E) thereof, entitled "Commercial paper, bankers acceptances and certificates of deposit," provides that any highly rated short-term promissory note with a maturity not exceeding nine months shall have "0 percent" deducted if the note has less than 30 days to maturity, and ¾ of 1 percent if the note has 181 days but less than 271 days to maturity. For comparison, Subdivision (F) thereof provides that a highly rated fixed rate debt security with a maturity of less than one year shall be subject to a deduction of two percent, and nine percent for a five year obligation.

general business conditions . . . or speculative activity on the stock market."[45] As so vividly put by Senator Glass,

> a man who makes a loan on commercial paper does not have to stand at a ticker and find out what is going to be the value of it 15 minutes afterwards.[46]

That is the difference between commercial paper and a security.

As with any commercial loan, commercial paper can lose its value if the issuer turns out to be a poor credit risk. But that is a credit risk, not a market risk, and securities are subject to both. Commercial paper is essentially subject only to the credit risk.[47]

Petitioners and their *amici* (*e.g.*, Becker Supplemental Appendix) have attempted to cast doubt on what commercial paper really is, *i.e.*, a short-term promissory note. Goldman Sachs even went so far as to argue (Br. 17-21) that commercial paper is a long-term instrument. Why would they make so desperate an argument? Because they recognize without saying it that they have to convert commercial paper into some-

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[45] *See* Foulke, *supra* note 15, at 92 (1933).

[46] *See* 1932 Hearings, *supra* note 34, at 267.

[47] Goldman Sachs cites the Penn Central case as evidence of the risk in commercial paper. But Penn Central evidences a credit risk, not a market risk. In fact Penn Central does not so much evidence the riskiness of commercial paper as it does a breakdown in the corporate disclosure system. *See University Hill Foundation* v. *Goldman, Sachs & Co.*, 422 F. Supp. 879 (S.D.N.Y. 1976). Since then commercial paper has come to be rated on a widespread basis by five independent rating services. Consequently, unrated or lower-rated paper cannot be sold easily in today's market. *See* Abken, *supra* note 10, at 15; Hurley, *supra* note 11, at 528-29. Bankers Trust does not handle unrated or low-rated paper. Moreover, the "hazard" of Bankers Trust's potential liability under Section 12(2) of the Securities Act of 1933 (Goldman Sachs Br. 11) for selling commercial paper is at most conjectural and the Court should not be asked to assume that Bankers Trust is handling its issuers' commercial paper in the manner that Goldman Sachs handled Penn Central paper.

thing that has a significant market risk if they hope to argue successfully that it is a security.

Their argument falls of its own weight. The financial markets are not confused. The *Encyclopedia of Banking and Finance* defines commercial paper as "[a]ll classes of short-term negotiable instruments (notes, bills, and acceptances) that arise out of commercial, as distinguished from speculative, investment, real estate, personal, or public transactions; . . . ."[48] The Board was not confused. The court of appeals was not confused. In fact, the court of appeals effectively stripped away the desperate arguments made by petitioners by narrowly limiting its decision to commercial paper exempted by Section 3(a)(3) from registration under the Securities Act of 1933.

Thus the court of appeals wisely reserved for another case and another day the possibility that someone would attempt to apply the term "commercial paper" to an instrument with market risk. The court of appeals dealt with commercial paper as it is today, the quintessential short-term note that is indistinguishable from a traditional bank loan.

IV.

Bankers Trust's Commercial Paper Service Does Not Expose The Bank To Hazards That Glass-Steagall Sought To Avoid.

In addition to the relative risklessness of commercial paper as discussed above, two factors are of paramount importance in considering the questions raised by petitioners concerning the "hazards" that Glass-Steagall sought to avoid. Both factors arise from the short-term nature of commercial paper. First, sophisticated purchasers are buying commercial paper to earn interest while they are waiting to invest their funds. Second, when the purchaser wants its funds it merely presents the paper at maturity. Consequently commercial paper is neither an investment in the traditional sense nor an investment giving rise to the "hazards" discussed by this Court in *ICI I*.

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[48] Munn and Garcia, *supra* note 31, at 196.

That case dealt with undivided participation interests in a pool of common stock being sold to the general public. The dangers for banks which the Court identified in that situation are not present in Bankers Trust's commercial paper activities. In *ICI I* the Court was dealing with long-term investments, but here we are dealing with short-term borrowing, which is the basic business of commercial banks. There is no danger of bank assets' being invested in frozen or otherwise imprudent stock or long-term security investments.

The "subtle hazards" described in *ICI I* are similarly inapplicable to Bankers Trust's commercial paper activities. One hazard was that a bank might make unsound loans to companies. But even if Bankers Trust were to purchase and keep commercial paper, it would do so under existing loan powers and within existing lending limits.[49] *See* page 20, *supra*.

Another hazard identified in *ICI I* was that a bank would make unsound loans to individual investors to enable them to purchase securities. This hazard has little relevance to commercial paper sales because the purchasers are mainly financial institutions and corporations that do not borrow from banks in order to finance the acquisition of commercial paper because it is rarely profitable to do so.[50]

A third hazard mentioned was that bad judgment could erode the confidence of depositors and the public in the bank and thereby threaten the stability of the bank itself. This

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[49] Goldman Sachs contends that Bankers Trust assures the success of the issuance by taking up the paper itself, either by buying the paper back from the original purchaser if it has an unexpected need for cash, or by "parking" the paper with its parent holding company for subsequent resale. Goldman Sachs Br. 7. In fact, the record states that the bank's sales of commercial paper are not "subject to a repurchase agreement between [the bank] and the purchaser" (R.65) and the Guidelines prohibit bank sales of commercial paper it handles to a non-bank affiliate. *See* ¶ 8, J.A. 189A.

[50] Report from the Board's On-Site Investigation of Bankers Trust 4 (May 8, 1980) (R. 593) (no evidence that funds borrowed from Bankers Trust were used to purchase commercial paper for which the bank acted as agent).

hazard is not applicable where the bank is assisting a well known and highly rated issuer of commercial paper in transactions that are in effect limited placements of short-term, prime quality borrowings with sophisticated purchasers, rather than sales to the general public of participations in a commingled stock investment fund bearing the bank's name as in *ICI I*. In the commercial paper situation the purchasers immediately recognize the issuers and do not associate them with the bank.

Lastly, the hazard that a bank might not tender disinterested advice to the purchaser is not present. Bankers Trust does not advise the purchasers to purchase the commercial paper. They are all institutional purchasers or other sophisticated investors that make their own decisions on how to earn interest on excess funds for brief periods.

Petitioners and their *amici* argue that the "promotional" aspects of and the "salesman's stake" in selling commercial paper raise a special hazard.[51] Their argument raises for them the difficulty of distinguishing the effect of those same aspects of banks' dealing in loan participations, bankers' acceptances, and certificates of deposit. If banks are to be forbidden the right to deal in commercial paper because of the ability to earn a fee or a "spread" in connection with its sale, then that decision raises the same questions with respect to other traditional bank credit instruments. The risks are not different. Moreover one cannot have the consequences envisaged in connection with the "potential hazards" of promoting long-term securities when the purchaser is a sophisticated financial institution and

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[51] Assuming a fee on the sale of commercial paper of 1/8 of 1 percent per annum (*see* Abken, *supra* note 10, at 11), the sale of $1,000,000 of 30-day paper would produce revenue of approximately $100. In comparison, underwriting notes, debentures or bonds has been producing for an investment banker a fee of $8,000 to $8,750 per $1,000,000 of debt sold, depending on whether the bonds are sold on competitive or negotiated offering. *See* D. Darst, *The Complete Bond Book* 239 (1975). (Bankers Trust believes that investment banking fees have decreased since 1975 and are currently in the range of $6,250 to $8,750 per $1,000,000 of the debt sold.)

all the purchaser has to do is wait an average of less than 30 days in order to receive full payment of principal and interest.

Goldman Sachs claims (Br. 10-11) that the very bank lines of credit that make commercial paper such a safe credit instrument create a conflict of interest when the commercial bank both handles the commercial paper and provides all or part of the back-up line of credit. Their argument misconstrues the commercial paper market. The institution handling commercial paper for the issuer cannot choose between continuing to sell the issuer's paper in the market and having the issuer draw on its lines of credit (as Goldman Sachs' argument presumes). The purchasers in the market are too sophisticated to buy if there is a question of creditworthiness. If a credit problem were to appear, purchasers would stop buying immediately, no matter what the institution did. Therefore, whether or not the lines are drawn upon is not a decision of the institution handling the paper; it is a decision of the marketplace.

Goldman Sachs also raises the potential liability of the institution handling an issuer's commercial paper if the issuer goes bankrupt while its paper is outstanding.[52] But this is not a new risk to banks. Banks have also been sued on loan participations for alleged non-disclosure under the securities laws, but that is not any reason to prohibit the sale of such instruments.

Petitioners and their *amici* also misuse the Board's Guidelines in an attempt to make a vice out of a regulatory virtue. As the court of appeals noted,[53] the Board was exercising its

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[52] In view of the safety of commercial paper, this is in any case a *de minimis* risk. *See* note 43, *supra*.

[53] "[T]he Board issued guidelines to ensure that sale of third party commercial paper did not give rise to 'unsafe or unsound practices.' These guidelines permitted banks to sell only prime quality third party commercial paper with maturity of nine months or less and in denominations of over $100,000. Banks could sell only to 'financially sophisticated customers,' and were forbidden to advertise to the general public. Sales to the bank's fiduciary accounts, parent holding companies and nonbank affiliates were also forbidden. Moreover, banks were required to maintain credit analyses of issuers, to limit

statutory powers to regulate "unsafe or unsound practices," not interpretative powers under Glass-Steagall as petitioners and their *amici* allege. There is a vast distinction. Even when instruments are universally conceded not to be securities for purposes of Glass-Steagall, *e.g.*, loan participations and bankers' acceptances, the banking regulators often regulate their use.[54] The issuance of the Guidelines was an exercise in proper bank supervision and the fact that the Board issued guidelines does not make the instrument a "security" for purposes of Glass-Steagall.

CONCLUSION

The court of appeals issued a very narrow decision upholding the Board's very narrow decision, both of which were limited to holding that commercial paper that is exempt under Section 3(a)(3) from registration under the Securities Act of 1933 is not a security for purposes of Glass-Steagall. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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the amount of paper sold for any issuer, and to maintain detailed records of sales, purchases and lines of credit extended. Finally, various disclosure requirements were imposed." (J.A. 225A) (Footnote omitted.)

[54] *See* Comptroller of the Currency, Banking Circular BC-181, *Purchase or Sale of Loans in Whole or in Part—Participations* (Dec. 8, 1983) (concerning loan participations); 12 C.F.R. § 208.8(d) (1983) (concerning bankers' acceptances).